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IN THE
COURT OF APPEALS OF INDIANA

PATRICK SABAJ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A05-0701-CR-25
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause No. 71D02-0510-FB-142

June 13, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Patrick Sabaj (Sabaj), appeals his conviction and sentence for Count I, sexual misconduct with a minor, a Class B felony, Ind. Code § 35-42-4-9; Count II, child molesting, a Class A felony, I.C. § 35-42-4-3; and Count III, incest, a Class B felony, I.C. § 35-46-1-3.

We affirm.

ISSUES

Sabaj raises two issues on appeal, which we restate as follows:

(1) Whether the State presented sufficient evidence to sustain Sabaj's conviction for sexual misconduct with a minor; and

(2) Whether the trial court abused its discretion by imposing consecutive sentences.

FACTS AND PROCEDURAL HISTORY

Sabaj, born June 1, 1952, is the biological father of J.S., born August 1, 1989. Sabaj and J.S.'s mother separated when J.S. was nine or ten years old. After the separation, J.S. lived with Sabaj on and off from the time he was in fifth grade through tenth grade. Following the separation, Sabaj fondled J.S.'s penis. Then, when J.S. was eleven years old, Sabaj showed J.S. and a friend pornography. On a different occasion, Sabaj tickled J.S.'s bottom and fondled his penis, again.

When J.S. was thirteen and in seventh grade, Sabaj preformed oral sex on his son. Sabaj also asked J.S. to perform oral sex on him. This behavior repeated "hundreds of times" over a period of approximately three years. (Transcript p. 62). Then, when J.S.

was fifteen years old and in ninth grade, while Sabaj and J.S. were in the living room watching Notre Dame play football against the University of Southern California, Sabaj had his son pull down his pants, lean up against the couch, and inserted his penis into J.S.'s anus. J.S. kept these incidents to himself for so many years because he was scared, embarrassed, and nervous, along with feeling a whole host of other emotions. When J.S. was sixteen years old, he told his mother and stepfather what had been happening when he lived with and visited his father.

On October 25, 2005, the State filed an Information charging Sabaj with Count I, sexual misconduct with a minor, a Class B felony, I.C. § 35-42-4-9; Count II, child molesting, a Class A felony, I.C. § 35-42-4-3; and Count III, incest, a Class B felony, I.C. § 35-46-1-3. The State amended Count I adding J.S.'s birth date and the phrase, "to wit: by placing his penis in [J.S.'s] anus." (Appellant's App. p. 8). On August 21, 2006, a bench trial was held and the matter was taken under advisement. On August 30, 2006, the trial court entered a judgment of conviction on all three Counts. On September 28, 2006, Sabaj was sentenced to the presumptive sentence for each offense: ten years for Counts I and III, and thirty years for Count II. All sentences were ordered to be served consecutively for an aggregate sentence of fifty years.

Sabaj now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Evidence*

Sabaj first argues the evidence was insufficient to support his conviction for sexual misconduct with a minor. Specifically, he claims the State failed to prove beyond a

reasonable doubt that J.S. was at least fourteen years of age, but less than sixteen years of age when Sabaj engaged J.S. in anal sex because no evidence of the specific date the offense occurred was presented. We disagree.

Our standard of review for a sufficiency of the evidence claim is well-settled. In reviewing sufficiency of the evidence claims, we will not reweigh the evidence or assess the credibility of the witnesses. *White v. State*, 846 N.E.2d 1026, 1030 (Ind. Ct. App. 2006), *trans. denied*. We will consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. *Id.* The conviction will be affirmed if there is substantial evidence of probative value to support the conviction of the trier of fact. *Id.* A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt. *Id.*

Sexual misconduct with a minor, as a Class B felony, is governed by I.C. § 35-42-4-9(a) and provides:

> A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony. However, the offense is:
> (1) a Class B felony if it is committed by a person at least twenty-one years of age . . . .

Our review of the record indicates J.S. was fifteen years old and in the ninth grade when Sabaj performed anal sex on him. The record provides J.S. was born August 1, 1989 and when he was in the ninth grade he was fifteen years old. Furthermore, the specific date of the offense could be deduced by looking at a 2004 Notre Dame football

schedule as J.S. testified the offense occurred during the Notre Dame/University of Southern California football game. Therefore, we find the evidence sufficient to support Sabaj's conviction for sexual misconduct with a minor.

II. *Consecutive Sentences*

Next, Sabaj argues the trial court abused its discretion by imposing consecutive sentences. Specifically, he claims the trial court failed to consider mitigators and failed to balance the aggravators and mitigators when imposing consecutive sentences. Additionally, he argues consecutive sentences are inappropriate in light of the nature of the offense and his character.

Sabaj committed the crimes against J.S. prior to April 25, 2005, when the Indiana General Assembly responded to *Blakely v. Washington,* 542 U.S. 296 (2004), by amending Indiana's sentencing statutes. Sabaj was sentenced under the "presumptive" sentencing scheme. This court is divided as to whether the presumptive sentencing scheme or the new advisory sentencing scheme applies to a crime committed before April 25, 2005, but sentenced after that date. *See, e.g. Weaver v. State,* 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), *trans. denied* (application of new sentencing statutes to defendants convicted before effective date of amendments, but sentenced afterward, violates prohibition against *ex post facto* laws); *but see Samaniego-Hernandez v. State,* 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (change in sentencing statute is procedural rather than substantive; therefore, we analyze this issue under amended statute that provides for advisory rather than presumptive sentences). Furthermore, this court held in *White v. State,* 849 N.E.2d 735, 743 (Ind. Ct. App. 2006), *reh'g denied, trans. denied* that I.C. §

35-50-2-1.3 adds no restrictions on the ability of trial courts to impose consecutive sentences beyond the restrictions already in place by virtue of Indiana Code § 35-50-1-2(c).

The legislature permits sentences to be imposed consecutively if aggravating circumstances warrant. *Lander v. State*, 762 N.E.2d 1208, 1215 (Ind. 2002). When the trial court imposes consecutive sentences where not required by statute, we examine the record to insure that the court explained its reasons for selecting the sentence. *Id.* Before the trial court can impose a consecutive sentence, the trial court must articulate, explain, and evaluate the aggravating circumstances that support the sentence. *Id.* The trial court's assessment of the proper weight of mitigating and aggravating circumstances is entitled to great deference on appeal and will be set aside only upon a showing of a manifest abuse of discretion. *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). Additionally, our supreme court has observed that *one* valid aggravating circumstance adequately supports ordering consecutive sentences, and that *Blakely* is not implicated by the trial court's decision to impose consecutive sentences. *See Mathews v. State*, 849 N.E.2d 578, 589 (Ind. 2006); *see also Williams v. State*, 827 N.E.2d 1127, 1128 (Ind. 2005).

Here, the trial court found *two* valid aggravating circumstances to support ordering consecutive sentences. First, the trial court found the three separate crimes were different acts and occurred at different times in different places over a period of six years. Second, the trial court found the instant offenses "involved the sexual victimization" of his biological son constituting a "violation of trust." (Tr. p. 215). Having found valid

aggravating circumstances, the trial court did not abuse its discretion when it imposed consecutive sentences under the circumstances here. *See Bryant v. State*, 841 N.E.2d 1154, 1158 (Ind. 2006).

CONCLUSION

Based on the foregoing, we find (1) the State presented sufficient evidence to sustain Sabaj's conviction for sexual misconduct with a minor; and (2) the trial court did not abuse its discretion when it imposed consecutive sentences.

Affirmed.

NAJAM, J., and BARNES, J., concur.